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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CV-60911-BLOOM
MAGISTRATE JUDGE P.A. WHITE

JAMES H. CAMPBELL,

:

Movant,

:

v.

:

REPORT OF
MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

:

Respondent.

:

I. Introduction

The pro se Movant has filed the instant "Petition for Writ of Error Coram Nobis to Vacate Conviction," pursuant to 28 U.S.C. § 1651. Review of the motion reveals that the movant is attacking the constitutionality of his conviction and sentence for weapons and narcotics offenses in case number 91-CR-6093-ROETTGER.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B), (C); S.D. Fla. Local Rule 1(f) governing Magistrate Judges; S.D. Fla. Admin. Order 2003-19; and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

Before the Court for review are the instant petition (DE# 1), the underlying criminal file, and the file in case number 97-CV-6612-ROETTGER. See Fed. R. Ev. 201. No order to show cause has been issued because, on the face of the motion, it is evident Movant is entitled to no relief. See Rule 4(b), Rules Governing Section 2255 Proceedings ("If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party

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is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party.").

II. Claim

Construing the *pro se* Movant's arguments liberally, Haines v. Kerner, 404 U.S. 419 (1972), he appears to argue that the Court lacked subject-matter jurisdiction to convict and sentence him to thirty years' imprisonment in case number 91-CR-6093-ROETTGER because a jury instruction error constructively amended the indictment to charge mere possession of a firearm in a drug crime which is a non-offense under 18 U.S.C. § 924(c). He claims that this error was recently discovered when he obtained portions of the trial record. He argues that he can overcome any procedural default by demonstrating cause and prejudice and actual innocence.

III. Procedural History¹

A jury found the Movant guilty in case number 91-CR-6093-ROETTGER, with: Count (1), attempt to possess with intent to distribute cocaine; Counts (2)-(4), possession of a firearm with an obliterated or altered serial number, and was sentenced to thirty years' imprisonment. The Eleventh Circuit *per curiam* affirmed on February 21, 1996. United States v. Campbell, 79 F.3d 1158 (11th Cir. 1996).

The Movant filed a Section 2255 motion to vacate on May 4, 1997, case number 97-CV-06612-ROETTGER. The Court denied relief on the merits on October 1, 1998. (97-6612 DE# 3). The Eleventh Circuit denied the Movant's motion for a certificate of appealability on April 4, 2000. See (91-6093 DE# 139).

¹ Due to the age of the criminal file, this section is largely gleaned from the Section 2255 proceedings in case number 97-CV-6612-ROETTGER. See (91-60933 DE# 119) (Report and recommendation).

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On February 9, 2017, the Movant announced his intention to file a fifty-page petition for writ of error *coram nobis* raising the same lack of jurisdiction claim he has raised here, and filed motions to file excess pages and proceed *in forma pauperis*. (91-6093 DE# 143, 144). On April 5, 2017, the Court denied his motions as moot and dismissed the *coram nobis* action as premature, even though he had not yet filed his substantive petition, because he is presently incarcerated and cannot assert a *coram nobis* claim as a matter of law. (91-6093 DE# 148).

The Movant filed the instant *coram nobis* petition on April 27, 2017.²

IV. Standard of Review

A petition for writ of error *coram nobis* is available to vacate a conviction when the petitioner has served his sentence and is no longer "in custody" for purposes of federal habeas relief. See United States v. Peter, 310 F.3d 709, 712 (11th Cir. 2002). *Coram nobis* is available to correct errors "of the most fundamental character" that have occurred in a criminal proceeding. United States v. Morgan, 346 U.S. 502, 512 (1954). This extraordinary relief, however, is available only "under circumstances compelling such action to achieve justice," that is, to correct errors resulting in a complete miscarriage of justice. Id. at 511; see United States v. Mills, 221 F.3d 1201, 1203 (11th Cir. 2000). A lack of subject matter jurisdiction has been recognized as fundamental, for which *coram nobis* relief may be proper as a matter of law. See Alikanai v. United States, 200 F.3d 732, 734 (11th Cir. 2000); United States v. Peter, 310 F.3d 709, 715 (11th Cir. 2002).

² Under the prisoner mailbox rule, a prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing. Adams v. United States, 173 F.3d 1339 (11th Cir. 1999).

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The following five requirements must be met to obtain *coram nobis* relief: (1) the conviction or sentence involved an error of the most fundamental character; (2) it is probable that a different result would have occurred but for the error; (3) adverse consequences continue to flow from the conviction such that a case or controversy exists; (4) a more usual remedy is not presently available; and (5) sound reasons exist for not challenging the error earlier, such as by direct appeal or collateral attack. Mills, 221 F.3d at 1204. A reviewing court must presume that the underlying proceedings were correct and the burden of showing otherwise is on the petitioner. Morgan, 346 U.S. at 512.

A writ of error *coram nobis* may be justified in light of a retroactive dispositive change in the law. See United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988). Therefore, under certain circumstances, the writ may lie where the convicted person has already completed his sentence and is no longer in custody. See Morgan, 346 U.S. at 510. However, if a claim relies on a case that was decided after the petitioner's conviction and sentence became final and the case is not retroactive, then the petitioner "has not suffered such compelling injustice that would deserve relief pursuant to a writ of error *coram nobis*." United States v. Swindall, 107 F.3d 831 (11th Cir. 1997).

Although available in unique situations, a writ of *coram nobis* "may not be granted when relief is cognizable under § 2255," regardless of whether a § 2255 motion would have succeeded." United States v. Holt, 417 F.3d 1172, 1175 (11th Cir. 2005).

Section 2255 authorizes a prisoner to move a sentencing court to vacate, set aside, or correct a sentence where "the sentence was imposed in violation of the Constitution or laws of the United

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States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a); see Hill v. United States, 368 U.S. 424, 426-27 (1962). A sentence is otherwise subject to collateral attack if there is an error constituting a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); Hill, 368 U.S. at 428.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") requires that:

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(b) (3) (A).

Although the statute does not define "second or successive," Eleventh Circuit precedent establishes that an earlier motion must be denied with prejudice to render a later motion second or successive. Wilson v. Mukasey, 290 Fed. Appx. 271 (11th Cir. 2008) (citing McIver v. United States, 307 F.3d 1327, 1330 (11th Cir. 2002), Dunn v. Singletary, 168 F.3d 440, 441 (11th Cir. 1999)).

A second or successive motion must be certified as provided in Section 2244 by a panel of the appropriate court of appeals to contain: (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. § 2255(h).

If a petitioner files a second or successive habeas petition without first seeking permission from the appellate court, the District Court is "without jurisdiction to entertain it." Burton v. Stewart, 549 U.S. 147, 153 (2007).

V. Discussion

The Movant is presently incarcerated in a United States Penitentiary while he is serving his thirty-years sentence in criminal case number 91-CR-6093-ROETTGER. As this Court previously held in the criminal case, his continued incarceration precludes him from obtaining *coram nobis* relief as a matter of law. See (91-6093 DE# 148).

The Movant presently seeks to vacate the sentence for which he is incarcerated and, therefore, the instant petition should be construed as a Section 2255 motion to vacate. However, this is an unauthorized successive motion because the Movant has previously filed a Section 2255 motion to vacate which was denied on the merits in case number 97-CV-6612-ROETTGER. His use of a writ of *coram nobis* is an improper attempt to circumvent the requirement in Section 2255(h) that he seek authorization from the Eleventh Circuit to file another Section 2255 motion. See 28 U.S.C. §§ 2255(h); 2244(b)(3); see also Holt, 417 F.3d 1172 (rejecting use of petition for writ of *audita querela* to vacate a sentence based on Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny).

The Movant's suggestion that his claim is based on newly discovered evidence or that his procedural errors are excused by

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cause and prejudice or actual innocence, is incorrect. Threshold matters must be presented to the Eleventh Circuit Court of Appeals in a successiveness application pursuant to Section 2255(h). See, e.g., Williams v. Chatman, 510 F.3d 1290 (11th Cir. 2007) (district court lacked subject-matter jurisdiction to consider, *inter alia*, Section 2255 movant's claim of newly discovered evidence because the movant had not obtained authorization to file a successive Section 2255 motion).

The Movant did not seek permission to file the instant motion to vacate from the Eleventh Circuit before filing this second or successive Section 2255 motion to vacate, therefore, the instant case should be dismissed for lack of jurisdiction.

If the Movant intends to pursue this case, he should forthwith apply to the United States Eleventh Circuit Court of Appeals for the authorization required by Section 2244(b)(3)(A). The Movant will be provided with a form to apply for such authorization with this report. Under the circumstances of this case it does not appear that either a direct transfer of the case to the Court of Appeals pursuant to Section 1631 or a stay of the present case would be appropriate. See generally Guenther v. Holt, 173 F.3d 1328 (11th Cir. 1999). He will be provided a copy of the appropriate form with this report.

VI. Certificate of Appealability

No certificate of appealability is required under *coram nobis*, however, the undersigned is recommending that this petition be construed as a Section 2255 motion to vacate.

Section 2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a

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final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." 28 U.S.C. § 2255, Rule 11(a). A timely notice of appeal must be filed even if the court issues a certificate of appealability. 28 U.S.C. § 2255, Rule 11(b).

After review of the record, the Undersigned finds no substantial showing of the denial of a constitutional right as to movant's claims. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (habeas petitioner must demonstrate reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues were adequate to deserve encouragement to proceed further). Therefore, it is recommended that the Court deny a certificate of appealability in its final order. If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the District Judge in objections to this report.

VII. Conclusion

Based on the foregoing, it is recommended that this Petition for Writ of Error Coram Nobis be construed as a motion to vacate pursuant to 28 U.S.C. § 2255 and that it be dismissed as successive, that no certificate of appealability issue, and this case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 10th day of May, 2017.


UNITED STATES MAGISTRATE JUDGE

(ENCLOSURE)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-cv-60911-BLOOM/White

JAMES H. CAMPBELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION**

THIS CAUSE is before the Court upon Petitioner's *pro se* Petition for Writ of Error *Coram Nobis* ("Petition"), which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on all dispositive matters. *See* ECF No. [3]. On May 10, 2017, Judge White issued a Report and Recommendation, construing the Petition as a Motion to Vacate pursuant to 28 U.S.C. § 2255 ("Motion"), and recommending that it be dismissed because Petitioner failed to seek and obtain permission from the Eleventh Circuit Court of Appeals to file a second or successive Motion.¹ *See* ECF No. [5]. As a result, Judge White concluded that this Court lacks jurisdiction over the Motion. *Id.* at 7. The Report and Recommendation advised Petitioner that "[o]bjections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report," making Petitioner's objections due by May 24, 2017. *Id.* at 8. Petitioner timely filed Objections to Report of Magistrate Judge ("Objections"). *See* ECF No. [7]. The Court has conducted a *de novo* review of Magistrate Judge White's Report and

¹ Petitioner previously filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 in case number 97-CV-6612-ROETTGER, which was denied on the merits.

Recommendation, the record, and Petitioner's Objections and is otherwise fully advised in the premises. *See Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009) (citing 28 U.S.C. § 636(b)(1)).

Petitioner's Objections are based upon arguments he raised in his pending Motion under Federal Rules of Civil Procedure 52(b) and 59(e) to Alter or Amend Judgment Denying Motion to Proceed *in Forma Pauperis* and Denying, As Moot, Motion to Exceed Page Limitation in Petition for Writ of Error *Coram Nobis* to Vacate Conviction ("Motion for Reconsideration") docketed in Case No. 91-cr-06093-Bloom.² *See* ECF No. [150], Case No. 91-cr-06093-Bloom.³ Specifically, Petitioner contends that the Court erred when it denied his original Motion to Proceed *in Forma Pauperis* and Motion to Exceed Page Limitation for Writ of Error *Coram Nobis* because it misstated the law when finding that Petitioner, due to his incarcerated status, could not state a cognizable *coram nobis* claim. *Id.* at 1. Although he recognizes that the Eleventh Circuit Court of Appeals has stated that a "writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody," he argues that this language should not be read to suggest that *coram nobis* is only available under such circumstances. *U.S. v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002). In support of his argument, Petitioner cites to a variety of cases from the Eleventh Circuit and other

² Petitioner also objects to other details within Judge White's Report and Recommendation, such as its characterization of a writ of error *coram nobis* under *U.S. v. Morgan*, 346 U.S. 502 (1954), or the recitation of the five requirements to obtain relief pursuant to a writ of error *coram nobis* under *U.S. v. Mills*, 212 F.3d 1201 (11th Cir. 2000). *See* ECF No. [7] at 2-3. The Court does not find any error in Judge White's characterization of the law. Further, the Report and Recommendation does not reach the merits of the Petition or otherwise apply the substantive standard for a writ of error *coram nobis* to the facts. Instead, the Report and Recommendation finds that *coram nobis* relief is not available to Petitioner because he is in custody. Thus, these objections have no relation to Judge White's well-reasoned findings and recommendations.

³ To the extent this Order refers to any docket entries from Case No. 91-cr-06093-Bloom, the Order will identify the criminal case number in the citation. Otherwise, any citations to docket entries pertain to this civil case.

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courts, claiming that these decisions entertained *coram nobis* petitions by incarcerated individuals and that this prohibition on the use of *coram nobis* relief by those in custody is “merely a misreading or invention by some panels in some circuits. . .” See ECF No. 7 at 5.

Neither the Objections or the Motion for Reconsideration direct the Court to any binding precedent wherein an incarcerated individual was allowed to substantively proceed with a petition for writ of error *coram nobis*. Indeed, in the Eleventh Circuit decisions upon which Petitioner relies, there is either no discussion or mention of the petitioner’s custodial status or the relief was denied because the petitioner was in custody. See *Carlisle v. U.S.*, 517 U.S. 416, 429 (1996) (“Apart from the fact that the District Court was not asked to issue, and did not purport to be issuing, a writ of *coram nobis*, that writ would not have lain here. . .”); *Ford v. U.S.*, 569 F. App’x 887, 888 (11th Cir. 2014) (affirming the denial of a petition for writ of error *coram nobis* without any discussion or mention of the petitioner’s custodial status); *U.S. v. Jerdine*, 379 F. App’x 963, 963 (11th Cir. 2010) (affirming denial of petition for writ of error *coram nobis* of a convicted felon who was *released* from custody); *U.S. v. Chavarry*, 376 F. App’x 928, 929 (11th Cir. 2010) (affirming district court’s denial of petition involving a federal prisoner because “at the time he filed his petition, Chavarry was in custody and thus could have collaterally attacked his conviction under 28 U.S.C. § 2255”); *Alikhani v. U.S.*, 200 F.3d 732, 733 (11th Cir. 2000) (affirming denial of petition for writ of error *coram nobis* without any discussion or mention of the petitioner’s custodial status).

This Court is bound to follow the decisions of the Eleventh Circuit, which have repeatedly affirmed denials of *coram nobis* relief to individuals who are in custody and serving their sentence. See *Garcon v. Florida*, 571 F. App’x 782, 783 (11th Cir. 2014) (“Because

Garcon is still in federal custody, he cannot seek *coram nobis* relief for his federal conviction”); *Jackson v. U.S.*, 375 F. App’x 958, 960, n.1 (11th Cir. 2010)(recognizing that the district court erred to the extent it construed a motion for *coram nobis* relief as one under § 2255 because the petitioner was no longer in custody); *U.S. v. Garcia*, 181 F.3d 1274, 1274-75 (11th Cir. 1999)(“Coram nobis relief is unavailable to a person, such as the appellant, who is still in custody. Accordingly, the district court properly denied appellant’s application for the writ.”). *See also U.S. v. Marchesseault*, No. 16-12886, 2017 WL 2297450, *2 (11th Cir. May 25, 2017) (italics in original, underline added) (“His motion is best construed as a petition for a writ of error *coram nobis* because he already completed his sentence.”). Following the Eleventh Circuit’s binding authority, this Court agrees with Judge White’s well-reasoned Report and Recommendation and finds that Petitioner cannot pursue his Petition for Writ of Error *Coram Nobis* at this time as he is, admittedly, still in federal custody. The Court also agrees with the analysis in Judge White’s Report and Recommendation, finding that Petitioner’s attempt to attack his conviction should be construed as a motion pursuant to 28 U.S.C. § 2255, which is successive and unauthorized for the reasons set forth therein.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Petitioner’s Objections, ECF No. [7], are **OVERRULED**;
2. Magistrate Judge White’s Report and Recommendation, ECF No. [5], is **ADOPTED**;
3. The Court construes the Petition for Writ of Error *Coram Nobis* as a Motion to Vacate pursuant to 28 U.S.C. § 2255, ECF No. [1], which is **DISMISSED** for lack of jurisdiction;

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4. Pursuant to Judge White's Recommendation, the Certificate of Appealability is **DENIED**;
5. For the reasons stated in this Order, the Clerk is **DIRECTED** to docket that Petitioner's Motion under Federal Rules of Civil Procedure 52(b) and 59(e) to Alter or Amend Judgment Denying Motion to Proceed *in Forma Pauperis* and Denying, As Moot, Motion to Exceed Page Limitation in Petition for Writ of Error *Coram Nobis* to Vacate Conviction, ECF No. [150], in Case No. 91-cr-06093-Bloom, is **DENIED**.
6. All pending motions are **DENIED AS MOOT**;
7. The Clerk shall **CLOSE** this case.

DONE AND ORDERED in Miami, Florida, this 31st day of May, 2017.



BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

The Honorable Patrick A. White

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13458-BB

JAMES H. CAMPBELL,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: TJOFLAT, MARTIN and JORDAN, Circuit Judges.

BY THE COURT:

James H. Campbell, a federal prisoner proceeding *pro se*, appeals from the district court's order construing his petition for writ of error *coram nobis* as an unauthorized successive § 2255 motion to vacate. He contends that *coram nobis* relief is available to incarcerated petitioners, and he met the requirements for seeking such relief.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

We review a district court's denial of *coram nobis* relief for abuse of discretion. *United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002). In a proceeding on a motion to vacate, we review the district court's factual findings for clear error while legal issues are reviewed *de novo*. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004).

The All Writs Act, 28 U.S.C. § 1651(a), provides federal courts the authority to issue writs of error *coram nobis*. *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). The *coram nobis* writ is an extraordinary remedy, though, that is only available "in compelling circumstances where necessary to achieve justice." *Id.* A court can only provide *coram nobis* relief if: (1) no other avenue of relief is available or has been available; and (2) the petitioner presents a fundamental error that made the proceedings irregular and invalid. *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000).

The Supreme Court has stated that the availability of relief under § 2255 does not preclude a prisoner from seeking *coram nobis* relief. *Morgan*, 346 U.S. at 510-11. In *Morgan*, the prisoner was serving an enhanced sentence because he was a repeat offender, and he sought *coram nobis* relief to challenge a prior conviction — the sentence for which he had already served. *Id.* at 503-04. The Supreme Court stated that "[a]lthough the term has been served, the results of conviction may persist," and the petitioner was "entitled to attempt to show that his conviction was invalid." *Id.* at 512-13.

In the context of a prisoner seeking to vacate the sentence for which he is presently incarcerated, we have held that *coram nobis* relief is not available, because he can seek relief under § 2255. *United States v. Brown*, 117 F.3d 471, 475 (11th Cir. 1997); *see also United States v. Garcia*, 181 F.3d 1274, 1275 (11th Cir. 1999). When a *pro se* pleading is "erroneously

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styled” as a *coram nobis* petition, the court should construe the petition liberally and treat it as a § 2255 motion. *Brown*, 117 F.3d at 474-75.

Before a prisoner may file a second or successive § 2255 motion, he must obtain an order from the court of appeals authorizing the district court to consider the motion. *See* 28 U.S.C. §§ 2255(h), 2244(b)(3)(A); *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005). Absent our permission, the district court lacks jurisdiction to address the motion. *Holt*, 417 F.3d at 1175.

Here, Campbell could not receive *coram nobis* relief, because he sought to vacate the sentence for which he is currently incarcerated. *See Brown*, 117 F.3d at 475. Therefore, the district court was correct in construing his petition as a § 2255 motion to vacate. *Id.* Because he had already filed a § 2255 motion that was denied on the merits, he was required to seek our authorization before filing a second or successive § 2255 motion. *See* 28 U.S.C. §§ 2255(h), 2244(b)(3)(A). Campbell had not received such authorization, and, therefore, the district court properly dismissed the motion because it lacked jurisdiction to consider it. *See Holt*, 417 F.3d at 1175.

Accordingly, the government’s motion for summary affirmance is GRANTED, the district court’s order denying Campbell’s motion to reduce sentence is AFFIRMED, and the government’s motion to stay the briefing schedule is DENIED as moot.

Note: Cover letter dated 1/10/18
J. Campbell

**Additional material
from this filing is
available in the
Clerk's Office.**